IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 300 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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THAKOR BACHUJI GEMARJI & 1 - Appellant(s)

Versus

STATE OF GUJARAT - Opponent(s)

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Appearance :
MR KJ PANCHAL WITH MRJM PANCHAL for Petitioner No(s).: 1,2.
MR AJ DESAI APP for Respondent No(s).: 1.

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 18 /08/2005

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA)

1. Appellants - Thakor Bachuji Gemarji and Thakor Dharsiji

Gemarji original accused Nos. 2 and 4 respectively have preferred this appeal challenging the judgment and order of the conviction passed by the learned Addl. Sessions Judge, Mehsana, Camp at Patan in Sessions Case no. 32 of 1996 convicting both the appellants for the offences punishable u/s 302 read with Section 34of the I.P. Code and directing them to undergo life imprisonment and to pay fine of Rs.500/- each in default thereof to undergo rigorous imprisonment of six months.

2. In brief, the prosecution case was that complainant Divanji Ganeshji Thakor lodged the complaint on 4-1-1997 that when he was sitting in the open “chowk” near the house of Talaji Mohanji after returning home from his field in the noon at about 12-00 O'clock, his brother Harchandji told him that when he was cutting babul tree in the morning at about 9-00 O'clock, Balaji Gemarji – co-accused told him as to why he was cutting “babul” tree and inflicted two stick blows on his back. Thereafter, in the evening at about 4-00 O'clock appellant No. 2 (original accused No. 4) Dharsiji Gemarji came with Dhariya and Chenaji Gemarji came with stick and they went to the chowk where Harchandji was reading and dragged him to the open chowk. While Chenaji Gemarji caught hold of Harchandji. Appellant No. 2 Dharsiji inflicted “dhariya” blow on the head of Harchandji. He (complainant) and his brother rushed there. At that time appellant

No. 1 Bachuji Gemarji and Thakor Babuji Talaji came from front. Babuji Talaji was having Dhariya and Bachuji was having "kotar" (wooden sword) and started frightening them. Meanwhile, Gemarji Bhathiji also came with "barachhi" abusing them and started beating. Appellant No. 1 Bachuji inflicted stick blow on Harchandji 's back. On account of the injury on head by "dhariya" Harchandji started bleeding and therefore he (complainant) tried to intervene to rescue. So Chenaji Gemarji inflicted stick blow on his left knee and appellant No.1 Bachuji inflicted stick blow on his brother Chanduji's back and waist. Babuji Talaji inflicted "dhariya" blow on his left palm and Chenaji and appellant No.1 Bachuji injured his right thumb with "Kotar". They also inflicted stick blows on the back of Harchandji who died on account of the injuries.

3. On the basis of the compliant, investigation was started and on completion of the investigation the charge sheet was laid before the Court for the offences punishable u/such 302-147-148-149-323-504 of the I.P. Code and u/s 135 of the Bombay Police Act against the appellants – convicts and four other persons. The offence being triable exclusively by the Court of Sessions the case was committed to the Sessions Court. Thereafter, learned Addl. Sessions Judge, Mehsana camp at Patan framed charge for the offences punishable u/sch 147/148-149-302-323 and 504 of the I.P.

Code and u/s 135 of the Bombay Police Act. The appellants – convicts and other co-accused pleaded not guilty to the charge and therefore the prosecution adduced the evidence to prove the charge against the appellants and other accused. On completion of the prosecution case, further statement of the accused – appellants and other accused were recorded u/s 313 of the Code of Criminal Procedure. The defence of the appellants – convicts in the further statements was of total denial. After hearing the oral submissions learned Addl. Sessions Judge found the appellants – convicts guilty of the charge punishable u/s 302 read with Section 34 of the I.P. Code and directed them to undergo sentence of life imprisonment, as aforesaid. Whereas other four accused were acquitted. Against this judgment and order of conviction the appellants – convicts have preferred this appeal.

4. Mr. K.J. Panchal learned advocate for Mr. J.M. Panchal for the appellants submitted that there are material contradictions between the medical evidence and oral evidence. There is no evidence as to who gave the fatal blow. The witnesses examined are interested witnesses. As per F.S.L. report, muddamal “dhariya” does not contain blood stained marks but “kotar” (wooden sword) contains the blood stained marks. Therefore, the prosecution evidence has glaring discrepancies and the appellants – convicts cannot be convicted on the basis of such evidence and

therefore they are required to be acquitted.

5. Mr. A.J. Desai, learned A.P.P. has submitted that the witnesses have supported the case of the prosecution and the charge is duly proved. There are no material discrepancies between the medical and oral evidence and therefore no interference is warranted in the judgment and order of conviction passed by the learned Addl. Sessions Judge, Mehsana.

6. In order to prove the case, the prosecution had examined complainant P.W. 4 Diwanji Ganeshji Exh. 30 who had stated in his evidence that appellant No.1 Bachuji Gemarji came with “Kotar” (wooden sword). Appellant No. 2 Dharsiji came with “dhariya”, Balaji Gemarji came with stick, Babuji Talaji came with “dhariya” and Gemarji Bhathiji came with “barachhi”. He has also stated that appellant No. 2 Dharsiji inflicted “dhariya” blow and appellant No. 1 Bachuji inflicted “Kotar” (wooden sword) blow on Harchandji's head. In the cross-examination the witness has admitted that he has not stated in his complaint that Bachuji gave “Kotar” blow on Harchandji's head. In the light of the evidence of this witness, the complaint filed by him at Exh.31 requires to be seen. In the complaint it is stated that appellant No.2 Dharsiji came with “dhariya” and he inflicted the injury on the head of Harchandji and appellant No. 1 Bachuji had “Kotar” (wooden

sword) and he and Chenaji inflicted “Kotar” (wooden sword) blow on Harchandji's back.

7. P.W. No. 5 Chandaji Exh. 32 has in his evidence deposed that appellant No.1 Bachuji gave “Kotar” blow and appellate No. 2 Dharsiji gave “dhariya” blow on the head of his brother Harchandji. In view of these two depositions it becomes clear that the witnesses have tried to establish that “dhariya” and “Kotar” blows were inflicted on Harchadnji's head . These oral versions are also contrary to the accusations in the complaint that only “dhariya” blow was given on the head of the deceased. If the oral depositions are accepted then there should be two injuries on the head of the deceased. In order to ascertain this evidence of P.W. 18 Dr. Hargovindbhai Parmar Exh. 61 who performed the post-mortem and the postmortem note Exh. 62 requires to be seen. The Doctor who had performed post-\mortem examination has deposed that the body of the deceased had following injuries.

i. One irregular shape C.L.W. Above left pelvish region oblique 3” x 2” bone deed with hard substance black clout present.

ii. An abrasion left fore-arm left fore-arm back upper

1 1/4” x 2 ¼ '

iii. An abrasion on right chest verticle on the axillary rib 4 ½ “ 4th, 5th left rib reddish

8. He has also deposed that injury No.1 was sufficient in the ordinary course of nature to cause death of deceased Harchandji. He has also stated that if injury no. 1 is caused by sharp edged weapon and over the said injury if blow is inflicted by hard and blunt substance then injury No. 1 could be caused. He has also stated that such injury could be caused by the “Kotar” (wooden sword). In the cross-examination the witness has stated that only one injury was found on the dead body of the deceased Harchandji. He has admitted that shape of the injury caused by “dhariya” can never be uneven and such injury could be caused by wooden pieces hit on the head. In view of this evidence, it is clear that death of Harchandji was homicidal and could have been caused by blow of “Kotar”. P.M. note Ex. 62 indicates that the body of deceased Harchandji had one irregular shaped – C.L.W. and two abrasions. It is difficult to believe that two injuries of same size and shape could be caused at the same spot with two different weapon used by two persons. As per the medical opinion the injury found on the body of deceased Harchandji could not have been caused by “dhariya”. F.S.L. report Exh.59 indicates that no blood

stained marks were found on the muddamal article “dhariya”. As against this, said F.S.L. report shows that the muddamal article “Kotar” (wooden sword) bears the blood stained marks. In view of this evidence, it is crystal clear that death of Harchandji was not caused on account of “dhariya” blow. Therefore, the learned Addl. Sessions Judge committed error in recording a finding that the appellants inflicted “dhariya” and “Kotar” blows on Harchandji's head which resulted into his death.

9. It is significant to note that in the complaint it is specifically alleged that appellant No.2 – Dharsiji gave “dhariya” blow on the head of deceased Harchandji. In the oral evidence, the complainant has changed his version by stating that appellant No. 1 Bachuji gave “Kotar” (wooden sword) blow on the head of his brother Harchandji and appellant No.2 Dharsiji also gave “dhariya” blow on the head of deceased Harchandji. In view of this, there are different versions about the weapons used and the injuries caused to the deceased. In the complaint there is mention of two “dhariyas”, one stick and one “Kotar” (wooden sword). Whereas in the oral deposition of the same witness he deposed about “Kotar” (wooden sword), two “dhariyas” one “barachhi” and one stick. As observed earlier, P.M. Note exh. 62 mentions only one injury of irregular shape on the head of the deceased. Therefore, it would be very difficult to believe that two injuries; one by “Kotar”

(wooden sword) and other by “dhariya” was caused to the deceased. It is submitted by the learned A.P.P. that as two blows were inflicted at the same spot on the head only one injury was found. However, in our view it would be difficult to believe that two injuries would be possible on the same spot by two different weapons used by two different persons. Therefore, in our view, the prosecution case that the death of deceased was caused by injury by “dhariya' is contrary to the evidence adduced by the prosecution. It is also very strange that there was no charge that appellant No.1 Bachuji inflicted “Kotar” blow on Harchandji's head. However, the learned Addl. Sessions Judge has recorded a finding in that regard. Therefore, also the trial Court has committed error in convicting the appellants.

10. P.W. 5 Chanduji Exh.32 has also stated in his evidence that appellant No. 1 Bachuji inflicted Kotar” (wooden sword) blow and appellant No.2 Dharsiji gave “dhariya” blow on the head of the deceased. It appears that the improvement is made only because P.M. note shows only one injury on the head of the deceased. As per the evidence, stick, “Kotar” (wooden sword) two “dhariya” and one “barachhi” were allegedly used in the attack. But the investigating agency has recovered only two “dhariyas”; one “Kotar” (wooden sword) and three wooden pieces. The F.S.L. report shows that no blood stained marks were found on the

muddamal “dhariya” allegedly recovered from appellant No. 2 – Dharsiji. In view of this, there are serious discrepancies in the evidence adduced by the prosecution and involvement of the present appellants and the role allegedly attributable to them becomes suspicious. It is significant that panchanama Exh. 36 is in respect of “dhariya” allegedly recovered from appellant No. 1 Dharsiji which does not contain blood stained marks. Panchnamas Exh.41 and 50 are in respect of the sticks allegedly recovered from other accused Balaji and Chenaji respectively. Recovery of “Kotar” (wooden sword) from appellant No. 1 Bachuji is not proved by the prosecution. It also appears that the witnesses who were examined were interested witnesses and have improved their version in oral testimony . Therefore, the prosecution evidence has discrepancies. In view of this, the prosecution has miserably failed to prove the case beyond reasonable doubt by unbroken chain of the evidence against the appellants and benefit of doubt is required to be given to the appellants.

11. Mr. Panchal, learned advocate for the appellants has relied on the judgment of the Hon'ble Supreme Court in the case of **Bhola Singh Vs. State of Punjab, reported in (1999) 9 SCC 50,** wherein the Hon'ble Supreme Court set aside the conviction observing that **when the prosecution version is that the appellant was with the sharp edged weapon and the medical**

evidence shows that the injuries suffered by the deceased were caused by the hard and blunt substance and there was no mention in the F.I.R. about use of sharp edge of blunt weapon, the benefit of doubt must be given to the accused.

12. Mr. Panchal learned advocate for the appellants has also relied on the judgment of the Hon'ble Supreme Court in the case of **Mathura Yadav @ Mathura Mahato and others Vs. State of Bihar reported in AIR 2002 Supreme Court 2707, wherein the accused were acquitted as there were glaring discrepancies in the evidence of the eye witnesses wherein the complainant had mentioned in the complaint that only 'dang' (weapon) was used by the accused and in the oral evidence after having noticed the nature of the injury use of stick was brought in.**

13. Mr. Panchal, learned advocate for the appellant has also relied on the judgment of the Hon'ble Supreme Court in the case of **State of Bihar Vs. Bishwanath Rai and others reported in 1997 Supreme Court Cases (Cri.) 1148,** wherein the Hon'ble Court found **the evidence of the eye witnesses inconsistent with the medical evidence regarding the injuries caused to the deceased creating a doubt regarding real manner in which the incident took place.**

14 In this case, there are numerous discrepancies in the evidence. Therefore, the appellants are entitled to the benefit of doubt.

15. In view of the foregoing discussion, the judgment and order dated 11-2-1997 passed by the learned Addl. Sessions Judge, Mehsana camp at Patan in Sessions Case No.32 of 1996 is required to be quashed and set aside. Accordingly, the appeal is allowed and the judgment and order dated 11-2-1997 passed by the learned Addl. Sessions Judge, Mehsana camp at Patan in Sessions Case No.32 of 1996 convicting the appellants is hereby quashed and set aside and both the appellants are hereby acquitted for the offences charged against them. The appellants shall be set free if they are not required in any other case.

(M.S. Shah, J.) (Bankim N. Mehta, J._

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